No. 3957

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE E. MILLER,
Plaintiff in Error,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation.
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

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Attorneys for Defendant, and Defendant in Error.

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MYERS PRINTING CO., SPOKANE.

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STATEMENT OF THE CASE.

This case arises upon Writ of Error to the United States District of the Eastern District of Washington, Northern Division, and as a basis underlying all of the specifications of error involves three primary questions;

1. Whether the Federal Employers Liability Act, the Federal Safety Appliance Act, the Federal Locomotive Boiler Inspection Law and the Rules of the Interstate Commerce Commission in conjunction have established different grounds for civil liability than those formerly existing under the common law action of trespass on the case established under the statute of Westminister II, 13 Edward I, C. 24 in that while on the one hand the old action of negligence in trespass on the case created *only one action of tort* for violation by defendant of its general duty to protect plaintiff from injury, on the other hand the Federal Statutes and the Interstate Commerce Commission Rules in conjunction create not a general duty on the part of the defendant to use care but a specific duty for each rule ordered to be obeyed and a distinct action of tort for each rule violated, when personal damage results to the plaintiff from such violation.

2. Whether, if an action of tort arising out of one violation of these Federal Acts and Interstate Commerce Commission rules is a distinct and separate action of tort from one arising out of another violation of these Acts and rules, it fairly can be called a splitting of the causes of action if two separate torts are

made the basis of two separate actions, even although both torts result in the same damage? It is admitted here that if damages be recovered in the action first brought, only nominal damages could be recovered in the second action; but the question is —if no damages are recovered in the first action, can it fairly be said that it is splitting the cause of action to bring the second action?

3. If it is not a splitting of the cause of action to bring a second action under these circumstances, is the merely practical reason that to permit the second action based upon the separate and distinct tort from that alleged in the first action would encourage a multiplicity of suits (especially in the light of the fact that the two years' statute of limitations practically prevents any numerous multiplicity of suits) valid in the light of the plaintiff's contention that to bar his second cause of action because he brought the first separate and distinct cause of action is a violation of plaintiff's rights guaranteed under the Fourteenth Amendment of the Constitution of the United States?

The plaintiff brought one action against the defendant based upon the alleged violation of the Federal Acts and the Rules of the Interstate Commerce Commission by constructing and permitting to be used upon its locomotive upon which the plaintiff was standing at the time of the accident, a cab apron that was perfectly smooth and not roughened as required by the rules and did not fit smoothly and extended about an inch or inch and one-half above the floor tender, which defects caused the plaintiff to trip and

fall from the locomotive, thus producing the damage to the plaintiff alleged in that cause of action.

See complaint in first cause of action and especially that part thereof quoted on pages 18, 19 and 20 of transcript.

In this first cause of action the jury returned a verdict for the defendant.

For reasons not stated in the transcript in the instant case but, plaintiff submits, properly inferable from the memorandum opinion of the learned judge denying plaintiff's motion for a new trial therein (which opinion is given in full in this brief, pages 40, 41, 42) the plaintiff did not allege or attempt to prove in the first cause of action any violation of the Interstate Commerce Commission's Rule that cab aprons shall be of proper length and width to insure safety, but did allege in his second cause of action brought after judgment for defendant in the first cause of action violations of this rule and of the further rule that "the minimum width of the gangway between locomotive and tender, while standing on straight track, shall be sixteen (16) inches, "and alleged that the cab apron was approximately nine (9) inches too short, thus leaving a hole between the front tender sill and tail piece on the locomotive thirteen (13) inches wide by sixteen (16) inches long; that by reason of this hole there were only approximately eight and one half (8½) inches in width of standing space at the gangway between the cistern on the tender and said hole at or in the vicinity of the place where plaintiff slipped, thus making an extremely narrow

and dangerous standing place or passage-way between said cistern and said hole; that the plaintiff in the course of his employment was standing on this narrow space, slipped and fell through said hole, thus producing the damage to himself alleged in both causes of action.

See original complaint in second cause of action (trans. pages 5 to 7) and amended complaint (trans. pages 34 to 36).

In the amended complaint all references to defects alleged in the first cause of action were stricken, thus basing the complaint upon violations of the Interstate Commerce Commission's Rules not mentioned in the first cause of action.

The defendant's answer, omitting the parts thereof not referring to matters raised by the writ of error herein by its third further and affirmative answer and defense, alleges in paragraph 7 thereof "that the accident described and set forth in the complaint herein is the same accident described and set forth in the former action * * *". the entire third answer being one raising the defense of *res adjudicata* (see trans. pages 13-14). To the defendant's answer were annexed the summons, complaint and answer in the first cause of action (see trans. pages 15-25).

The plaintiff's reply in the second cause of action admits paragraph 1 of the defendant's third answer and defense except as to the number of the case, which defendant had wrongly given (which however, raises no questions in the present proceeding) admits all the other paragraphs thereof except paragraph 7,

and, as to paragraph 7, alleges "Plaintiff admits that the falling out of the cab and locomotive and the physical injury, pain and suffering, the loss of employment, and the permanent impairment of plaintiff's earning power and ability resulting therefrom are the same as those referred to in plaintiff's former complaint mentioned in defendant's third affirmative defense, but also alleges that the negligence on the part of the defendant and the present cause of action based thereon are not the same as those set forth in his said former complaint, and denies each and every other allegation in said paragraph 7 of defendant's third affirmative defense." (See trans. pages 26-27). The defendant moved for a dismissal of the action on the ground that the former judgment was a bar, that the matter was *res adjudicata* and that plaintiff was estopped to maintain this action. (See trans. pages 28-29). The plaintiff filed a brief on defendant's motion to dismiss (See trans. pages 40-61) which is hereby referred to and made a part of this statement of facts.

The learned Judge granted defendant's motion and this action was dismissed. (See trans. page 62) The Court's action was based upon its memorandum opinion (trans. pages 57-61.) Whereupon plaintiff brought his petition for writ of error herein (trans. pages 63-64) and did all acts and things necessary to bring the matter into the Circuit Court of Appeals.

Thus it is seen that the basic questions involved herein are those three mentioned at the beginning of this statement of facts.

SPECIFICATION OF ERRORS UPON WHICH PLAINTIFF RELIES.

These are those stated in the assignments of error (trans. pages 65-67) but may be summarized as follows:

I.

In dismissing the action and in ordering and entering judgment for the defendant on the pleadings.

II.

In finding and ruling in its memorandum decision (trans. bottom page 67 and first four lines on 58) as follows:

> "The answer interposes the defense of *res adjudicata,* and inasmuch as that defense has not been denied * * *."

III.

In that the learned Judge in his memorandum decision erroneously said (trans. page 58.) "In a former action * * * to recover for the same injuries," and and again (same page) "In the second action * * * for the same injuries," and again (page 59) "although the injuries complained of in both actions are one and the same" and again (bottom page 59) "And inasmuch as the second action here is upon the same

claim or demand as was the first" and again on page 60 "but where several breaches result in a single injury it gives but one right of action and no more."

The error claimed as existing in the above quotations is that the memorandum opinion uses the words "injury" and "injuries" in two different senses, one connoting "accident" and the other connoting *"injuria"* or a violation of legal right. The plaintiff admits that the accident, or damage, is one and the same in both causes of action, but asserts that the *injuria* or violation of plaintiff's right is separate and distinct in each.

In other words plaintiff claims as error that the learned Judge found and ruled that the two breaches referred to in the memorandum decision, that stated in the first and that stated in the second cause of action, resulted in a single injury rather than in a single accident or damage. This distinction between the words "injuries" in the sense of *"injuria"* and "accident" in the sense of damage the plaintiff claims to be of the utmost importance, and that practically all the errors claimed by the plaintiff as having been committed have resulted from a confusion of the meanings of these terms.

IV.

In finding and ruling (trans. 60) that "it is entirely immaterial whether the charge of negligence is based on the rules of the common law or upon a state or federal statute.

V.

In assuming that the language of the Court in *Jenkins vs. Atlantic etc.* (trans. page 60) that "this is an entire claim for a single tort" etc., and of Judge Dunbar (trans. page 61) namely "They should not be allowed to split their causes of action" etc. are applicable to the instant case.

VI.

That the learned Judge's rulings, findings, granting of said motion to dismiss plaintiff's complaint and for judgment on the pleadings and the judgment for the defendant entered in accordance therewith were and are in contravention of the Fourteenth Amendment of the Constitution of the United States, and, if not reversed, would take away without due process of law a valuable property right guaranteed the plaintiff by the Constitution of the United States and articles in Amendment thereof.

ARGUMENT.

Strictly speaking there is but one main question involved in this case;—namely whether the plaintiff is right in his contention that whatever may be the effect of the Federal Employer's Liability Act taken by itself alone, the effect of that Act in combination with the Federal Safety Appliance Act, or the Federal Locomotive Boilers Inspection Act (either singly or together), and their amendments and the

Rules of the Interstate Commerce Commission regarding the inspection and testing of locomotives and tenders and their appurtenances, under such combination is to change the nature of causes of action arising under such combination from what was the case formerly. This will be considered in greater detail later in this brief.

For the present it is enough to say that while under the common law as it has existed since the enactment of the Statute of WESTMINSTER II, 13 Edward I, C. 24, creating the action of Trespass on the Case, the duty of the defendant carrier towards his employee was general, that of affording him proper protection as defined by the well known rules in the law of Master and Servant, under the above combination of federal laws and rules the plaintiff contends that the duty of the defendant carrier was made specific. It was required to use certain safety appliances and to observe certain specific directions concerning the kind, nature, quality, quantity and use of certain specific parts of locomotives, their tenders and appurtenances. The observance of each specific rule was made a specific duty any violation of which resulting in damage to the employee became a specific actionable tort. Violation of each specific rule constituted a new tort, although the different specific torts may have resulted in the same damage to the employee, the only effect of several torts producing the same single damage being that recovery by the employee thus damaged and compensation to him became compensation for all the torts involved, while on the other

hand a denial by any tribunal that one specific duty was violated did not preclude recovery in a case where the violation of another specific duty was alleged and proven.

If plaintiff's position be correct, then each violation of a different specific duty resulting in damage to the plaintiff employee becomes a different specific tort ,and it is not therefore necessary to join these different torts in the same action. Nor, under such circumstances, is it a splitting of causes of action to make each specific tort the basis of different, even although successive, actions. Further, if plaintiff's position be correct, and plaintiff therefore has these different specific causes of action is it in accordance with law to deny the plaintiff's right to maintain a new action for a tort different than that which was the basis of a previous unsuccessful action, merely because not to deny plaintiff's right might result in a multiplicity of suits. Plaintiff maintains that to deny him his right under such circumstances is to violate the Fourteenth Amendment to the Constitution of the United States.

II.

Such being plaintiff's position, he has claimed as error the statement of the learned Judge in the District Court (trans. page 58), to the effect that plaintiff had not denied defendant's defence of *res adjudicata,* for the precautionary reason that the language of the District Court might be taken as finding and ruling

that the plaintiff admitted the defence of *res adjudicata* to be true in fact and good in law.

As a matter of fact plaintiff's reply to defendant's defence of *res adjudicata* admits the damages alleged in both actions to be the same, *but denies that the causes of action are the same,* (trans. page 27). If this be understood, the plaintiff has no further objection to the statement above claimed as error.

III.

Plaintiff's specification of error to the District Court's Statement (trans page 60) that "it is entirely immaterial whether the charge of negligence is based on the rules of the common law or upon a state of federal statute" is a denial of the correctness of plaintiff's position on the main question as stated Supra. Discussion of this specification therefore will postponed until and included in plaintiff's discussion of the main point of his brief.

The District Court in its memorandum decision quoted with approval the statements of certain authorities as referred to below.

The plaintiff's counsel refers to these quotations now, before taking up in detail the consideration of the main question involved in plaintiff's case, because the quotation with approval by the learned District Judge of these unquestionable authorities seems to plaintiff counsel to beg the question at issue. The statements by these authorities, in general at least, is not controverted by plaintiff. What plaintiff's coun-

sel respectfully submits is, that from his point of view, these statements have have nothing whatever to do with plaintiff's position, except in so far as the assumption that they do controvert plaintiff's position constitutes, plaintiff's counsel respectfully submits, a begging of the entire main question at issue.

The learned Court in its memorandum decision (trans. pages 60 and 61) quotes with approval the language of the court in *Jenkins vs. Atlantic Coast Line R. Co.* 179 Fed. 535,539 as follows: (trans page 60).

"As said by the Court in Jenkins vs. Atlantic Coast Line R. Co., 179 Fed. 535, 539:

> "This is an entire claim for a single tort, and all the various items tending to show negligence on the part of the carrier, and all of the elements of damage to her resulting from such negligence must be included in the one action wherein she is entitled to recoved such compensation as she may be entitled to for each and all of such items."
>
> " 'Experience has disclosed that for the security of rights and the preservation of the repose of society a limit must be imposed upon the facilities for litigation.' "

Also the language of Judge Dunbar in *Sweeny vs. Waterhouse & Co.* 43 Wash. 613,616 as foilows: (trans. pages 60 and 61).

"It is hardly worth while to go into a discussion of the doctrine of *res adjudicata* and the cases cited thereon. This Court has, in more recent cases, somewhat modified the doctrine as announced in the earlier cases, where the old rule was laid down that the plea of *res adjudicata* applies not only to points which were raised but to those which might have been raised in the trial of the former action. But no court, we think, has gone so far as to allow a litigant to experiment with a court by trying his case piecemeal. The cause of action which the appellants now urge was available to them at the former trial, the assignments set forth in the complaint having been obtained prior to the commencement of the first action. They should not be allowed to split their causes of action, try their case out on a part of the causes, and if they fail, commence another action setting forth the other causes."

So also the learned Court said: (trans pages 58-60).

"The plaintiff earnestly insists that he has a right of action for each and every breach of a statutory duty and that a judgment against him in an action for one breach is no defense to a second action for another and different breach, although the injuries complained of in both actions are one and the same. To this contention I cannot yield assent, and the decisions in both the state and federal courts are against it.

In *Sayward vs. Thayer,* 9 Wash. 22, Chief Justice Dunbar said:

> "The general doctrince is that the plea of *res judicata* applies, except in special cases, not only

> to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising a reasonable diligence, might have brought forward at the time."

"To the same effect, see *Cromwell vs County of Sac.,* 94 U. S. 351, and *Board of Commissioners vs Platt,* 79 Fed. 567. The scope of the estoppel is not the same in all cases. Thus, where the second action is between the same parties but upon a different claim or demand, the estoppel is limited to the points in issue and actually determined in the first action. But where the second action is upon the same claim or demand the estoppel extends not only to the points at issue in the first action but to all claims and all defenses that might have been advanced or interposed by the respective parties. This distinction is clearly pointed out in the Cromwell case, *supra.* And inasmuch as the second action here is upon the same claim or demand as was the first, the estoppel extends not only to the matters at issue in the former action but to each and every claim of negligence which the plaintiff might advance in support of his right of recovery. No doubt, as claimed by the plaintiff, the law gives a right of action for each and every breach of a statutory duty, but where several breaches result in a single injury it gives but one right of action and no more. And under this rule it is entirely immaterial whether the charge of negligence is based on the rules of the common law or upon a state or federal statute."

None of these cases arose under the Federal Statutes and the Interstate Commerce Commission Rules, which form the basis of the action in the instant case.

The *Jenkins Case* will be considered last as it involves a tort for a railroad accident.

The *Sweeny Case* is an action for non-delivery of a consignment of freight.

The *Sayward Case* was a controversy over logs.

Cromwell vs. County of Sac., and Board of Commissioners vs. Platt both involved questions of municipal bonds.

None of the quotations above stated are objectionable to the plaintiff's position and only one, plaintiff's counsel respectfully submits, has any bearing upon plaintiff's position.

The District Court (trans. page 59), however, says:

"The scope of the estoppel is not the same in all cases. Thus, where the second action is between the same parties but upon a different claim or demand, the estoppel is limited to the points in issue and actually determined in the first action. But where the second action is upon the same claim or demand the estoppel extends not only to the points at issue in the first action but to all claims and all defenses that might have been advanced or interposed by the respective parties. This distinction is clearly pointed out in the Cromwell case, *supra.*"

To this distinction plaintiff agrees, but disagrees with the statement immediately following (trans. page 59 bottom) that the second action in the instant case is upon the same claim and demand as was the first.

Indeed, in the memorandum decision of the same judge in the former case, in which the Court denied plaintiff's motion for a new trial, the Court said: (See appendix to this brief, pages 40, 41, 42.)

"On the contrary the plaintiff is seeking a new trial for the purpose of presenting to a new jury a new and independent charge of negligence not contained or even referred to in the original complaint" Why is not this statement in agreement with plaintiff's position in the instant case?

"The distinction, often not well noted, between "injuries" as used in the Federal Act and *"injuria"* and the different possible connotations of the word "accident" should be borne in mind most carefully. Otherwise, particular danger exists in the instant case of being misled by the "fallacy of ambiguous middle" or of using the middle term in two different senses in the major and minor premises of the syllogism

Specifically what the plaintiff did admit is shown in paragraph 7 (trans. page 27) of his reply, as follows:

"Plaintiff admits that the falling out of the cab and locomotive and the physical injury, pain and suffering, the loss of employment, and the permanent impairment of plaintiff's earning power and ability resulting therefrom are the same as those referred to in

plaintiff's former complaint mentioned in defendant's third affirmative defence, but also alleges that the negligence on the part of the defendant and the present cause of action based thereon are not the same as those set forth in his said former complaint, and denies each and every other allegation in said paragraph seven of defendant's third affirmative defence."

Assuming for the sake of argument that the case of *Jenkins et al. vs. Atlantic Coal R. Co.,* 179 Fed. 535 correctly states the law in Common Law actions of negligence, paragraph 7 of plaintiff's reply, (trans. page 27) would be an admission (inferentially at least) that both the accident and the *"injuria"* were identical in both the former and the present action of the plaintiff against the defendant, whether the word "accident" was used in the two different senses referred to above or not, IF THESE TWO CASES OF MILLER VS. THE SPOKANE INTERNATIONAL RAILWAY COMPANY HAD BEEN CASES FOUNDED UPON THE COMMON LAW ACTION OF NEGLIGENCE, BUT NOT WHEN IN FACT THESE ACTIONS ARE BROUGHT UNDER THE FEDERAL STATUTE.

In the Jenkins case, the plaintiff had previously brought an action in a South Carolina court against one defendant railroad company for "damages for the same injuries" as set forth in the second complaint against another defendant railroad company; and it was contended by the defendant in the federal court case that privity existed between the defendant railroads in each case and that the judgment for the de-

fendant in the state court was a bar to the action in the federal court.

The question arose in the Circuit Court of the United States for the District of South Carolina on plaintiff's motion to strike from the defendant's answer the defence outlined above. This motion the Court denied.

The Circuit Court of the United States held that privity did exist between the defendants in each of the cases.

Secondly, the Court said that the plaintiff's cause of action was that of a passenger against a carrier IN NOT SAFELY CARRYING HER. NOTE HERE THE GENERAL DUTY OF SAFE CARRIAGE UNDER THE COMMON LAW AS AGAINST THE SPECIFIC DUTY TO DO SPECIFIC THINGS PLACED UPON CARRIER BY THE FEDERAL STATUTE, WHICH WILL BE QUOTED LATER.

The Court showed by the evidence that also the specific acts of negligence in violation of the general duty imposed by the Common Law, shown in the two cases were really identical, as disclosed by the evidence. Hence this was of itself sufficient ground for the Court's decision in the federal case.

But the Court went on and said, page 538 (the capitalization of sentences being ours, whether that

were so or not, a party who had a cause of action growing out of a tort, cannot be permitted to divide the tort, and make it the subject of different suits.

"The plaintiff's cause of action here is that as a passenger, she had a right to safe carriage. That is her primary right, and there is a corresponding primary duty devolving upon the carrier to safely carry her. It was for this neglect of duty—this delict—resulting, as she alleged in injury to her, that she claims damages against the carrier. THIS IS AN ENTIRE CLAIM FOR A SINGLE TORT, AND ALL THE VARIOUS ITEMS TENDING TO SHOW NEGLIGENCE ON THE PART OF THE CARRIER AND ALL OF THE ELEMENTS OF DAMAGE TO HER RESULTING FROM SUCH NEGLIGENCE MUST BE INCLUDED IN THE ONE ACTION WHEREIN SHE IS ENTITLED TO RECOVER SUCH COMPENSATION AS SHE MAY BE ENTITLED TO FOR EACH AND ALL OF SUCH ITEMS."

In commenting upon this case, let us note that the Common Law action of Negligence arose as one of the forms of the old action (under the statute of Westminster II, 13 Edward I, C. 24) of Trespass on the Case and that three elements are essential to its existence as an action of negligence;

(1) The existence of a duty on the part of defendant to protect plaintiff from the injury.

(2) Failure of defendant to perform that duty; and

(3) Injury to plaintiff from such failure of defendant, 29 Cyc. 419 Article Negligence.

When any injury results to the plaintiff from failure of defendant to perform his LEGAL DUTY towards the plaintiff, a cause of action arises.

As was the case under the old statute of Westminster II, so also under the Federal Acts it is true that WHEN ANY INJURY RESULTS TO THE PLAINTIFF FROM FAILURE OF THE DEFENDANT TO PERFORM HIS LEGAL DUTY TOWARDS THE PLAINTIFF A CAUSE OF ACTION ARISES.

Consideration of both these laws, the old common law, based upon the ancient statute, and the modern federal laws, discloses clearly the fact that the test as to the number of actions that can be maintained depends not only upon the question as to the number of injuries (using the word not as connoting *"injuria"* but as connoting physical, mental or pecuniary damage) but UPON THE NUMBER OF LEGAL DUTIES VIOLATED. One right of action exists (under both the ancient and the federal law), for *each legal duty violated regardless* of the number of physical, mental or pecuniary injuries inflicted. The Jenkins case itself is clear upon this point. See *supra.*

The essential difference between the two laws lies in the fact that under the old law based on the ancient statute THE LEGAL DUTY CLEARLY WAS

GENERAL, while, on the other hand, under the modern federal statutes, the LEGAL DUTY CLEARLY IS SPECIFIC.

V.

MAIN POINT OF PLAINTIFF'S CASE.

As previously stated plaintiff's main position is:

(1) That contrary to the Common Law Rule, each violation of the Interstate Commerce Commission Rules under the Locomotive Boilers' Inspection Act, the Federal Safety Appliance Act and the amendments to these acts, and the Federal Employer's Liability Act, when it results in damage to the plaintiff employee, constitutes a tort distinct and separate from each violation of any other rule.

(2) That these distinct and separate torts give rise to separate and distinct causes of action.

(3) That this is true, even in cases in which the distinct and separate torts result in the same damage, the only difference being that compensation for damages recovered in one cause of action necessarily would cover the compensation in all.

(4) That such separate and distinct causes of action may be brought successively for the short time permitted by the Statute of Limitations without breaking the rule against splitting actions or rendering the defence of *res adjudicata* valid and operative.

A

STATEMENT OF FEDERAL LAWS AND COMMISSION RULES APPLICABLE TO THE INSTANT CASE.

Under act of April 22, 1908, Ch. 149, 35 Stat. L. 65, Barnes Federal Code, 8069, 8 Fed. Stat. Ann. (2d. ed.) page 1208, Compiled Stats. 8657, constituting part of the Federal Employers' Liability Act, also known as the "Sterling Act," and sometimes styled the "Second Employers' Liability Act" it is enacted (the large type being ours), that "Every common carrier, by railroad, while engaging in commerce between any of the several states or territories * * * or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury or death resulting in whole or in part * * * by reason of ANY DEFECT OR INSUFFICIENCY, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The right of action according to the words of the act above quoted does not arise out of violation of a general primary duty of the defendant to furnish safe tools, a safe place to work, etc., and a violation of a corresponding general primary right of the plaintiff to have been furnished with safe tools and appliances and a safe place in which to work; but it arises out of a violation of plaintiff's right that there

should not exist any specific defect by reason of which the plaintiff has suffered injury.

The particular rights of the plaintiff and the particular duties of the defendant towards the plaintiff are found in the Federal Locomotive Boiler Inspection Law, so called, as amended March 4, 1915, and in the RULES AND INSTRUCTIONS FOR INSPECTION AND TESTING OF STEAM LOCOMOTIVES AND TENDERS, approved by orders of the Interstate Commerce Commission, dated October 11, 1915, June 30, 1916, November 13, 1916, December 26, 1916, December 17, 1917 and April 7, 1919.

See Act of Feby. 17, 1911, Ch. 103, 36 Stat. (913 et seq. or Locomotive Boiler Inspection Law.)

Act of March 4, 1915, Ch. 169, 38 Stat. L. 1192 or amendment of the above law. (See 8 Fed. Stat. Ann. 2nd. Ed., pages 1200-1206, Barnes Federal Code, Secs. 8046 to 8057, both inclusive, U. S. Compiled Statutes, Sections 8630 to *8629 inclusive and Secs.* 8639b and 8639c.) See also Laws, Rules and Instructions of Interstate Commerce Commission referred to above.)

By these various statutes and rules and regulations made by the Interstate Commerce Commission it appears—

(a) By the Locomotive Boiler Inspection Law that it is unlawful for any common carrier engaged in interstate or foreign traffic to use any locomotive engine

propelled by steam power unless its boiler and appurtenances are in a proper condition safe to operate:

(b) By the amendment above referred to (approved March 4, 1915,) the Locomotive Boiler Inspection Law is made to apply to and include the entire locomotive and tender and all parts and appurtenances thereof;

(c) By section 5 of the original act (the Boiler Locomotive Inspection Law) which by the amendment referred to in (b) is made to apply to the entire locomotive and tender and all parts and appurtenances thereof, each carrier subject to this act, is required to file rules and instructions for inspection with the chief inspector appointed under Section 3 of the Act by the President of the United States, and these rules and instructions subject to such modifications as the Interstate Commerce Commission requires, shall become obligatory upon the carrier. If the carrier fails to file the rules and instructions, the chief inspector is required to prepare such, which after approval by the Interstate Commerce Commission, shall be obligatory upon the carrier, and a violation of such by the carrier is made unlawful and is subject to punishment under the Act;

(d) That the Chief Inspector also is required under Section 5 of the original Act to make all needful rules, regulations and instructions for the conduct of his office and for the government of the district inspector required under the Act;

(e) That June 2, 1911, the Interstate Commerce Commission after noncompliance by many carriers

with the directions to make rules and instructions, and on the request of all the carriers who had made such rules and instructions prepared new rules and instructions for all carriers under the Act;

(f) That thereafter these rules, regulations and instructions were modified and added to by the Interstate Commerce Commission from time to time applying to the locomotives, tenders and all of their parts and appurtenances;

(g) That among the rules and instructions in accordance with the amendment of March 4, 1915, to the Locomotive Boiler Inspection Act, approved by orders of the Interstate Commerce Commission see page 54 of Laws, Rules and Instructions for Inspection, and Testing of Steam Locomotives and Tenders is rule 117 as follows:

"117 cab aprons—Cab aprons shall be of proper length and width to insure safety, * * *

Also among said rules (see page 66) is the following:

"152 * * * (c) The minimum width of the gangway between locomotive and tender, while standing on straight track shall be 16 inches";

(h) That under Section 9 of the Locomotive Boiler Inspection Act "any common carrier violating this act or any rule or regulation made under its provisions * * * shall be liable to a penalty of one hundred dollars for each and every such violation, to be

recovered in a suit or suits to be brought by the United States Attorney having jurisdiction in the locality" etc.

B

It is therefore respectfully submitted under the above quoted and referred to rules, regulations and instructions;

1 That the defendant in the instant case is liable to the plaintiff, not for the violation of a general duty to provide him with safe tools and appliances and a reasonably safe place in which to work, but for *injury resulting from any defect specifically forbidden by the Rules.*

2. THAT THE DEFENDANT IS LIABLE TO THE PLAINTIFF FOR ANY INJURY RESULTING FROM THE SPECIFIC ACT OF NEGLIGENCE ARISING FROM ITS VIOLATION OF ANY PART OF RULE 117 OR OF RULE 152-C OF THE LAWS, RULES AND IN STRUCTIONS ABOVE QUOTED.

3. THAT THE RULE IN THE JENKINS CASE CITED BY THE LEARNED COUNSEL FOR THE DEFENDANT DOES NOT APPLY TO THE INSTANT CASE.

The United States Supreme Court has said on the question of negligence, "IT IS OF COURSE SETTLED THAT IF THE EQUIPMENT WAS IN FACT DEFECTIVE OR OUT OF REPAIR, THE QUESTION WHETHER THIS

WAS ATTRIBUTABLE TO THE COMPANY'S NEGLIGENCE IS IMMATERIAL." Spokane etc. R. Co. vs. Campbell, 241 U. S. 497, S. C. 683 60 U. S. (L. Ed.) 1125 at 1134. United States vs. Oregon-Washington R. & N. Co., 6, 213 Fed. 689 at 690 per Judge Rudkin.

A VIOLATION OF THE SAFETY APPLIANCE ACT IS NEGLIGENCE PER SE.

Lemme vs. Texas etc. Ry. Co., 141 L. A. 769 75 *sc.* 676.

See, also, Judge Rudkin's statement in Campbell vs. Spokane & Inland Empire R. Co., 188 Federal 516, pp. 517, 518, "When a statute is designed to protect a particular class of persons against a particular class of injuries, a violation of the statutory duty constitutes negligence *per se* whenever one of the protected class is injured from a cause against which the statute was designed to protect him." A good illustration of the fact that the rights granted and duties imposed by the Federal Acts under discussion are SPECIFIC and not general is illustrated in the remarks of Bullington, Circuit Judge, in U. S. vs. Erie R. Co., 212 Fed. 853. "These duties of air-brake equipment and air-brake use are separate and distinct," etc. See, also, U. S. vs. Pere Marquette Co., 211 Fed. 221;

Louisville & N. R. Co. vs. Layton, 243 U. S. 617, 37 Sup. Ct. 465, 61 L. Ed. 931, at 933;

St. Joseph & Grand Island Railway Co. vs. Moore, 243 U. S. 311, 37 Sup. Ct. Ref. 278, 61 L. Ed 741 at 745, 746.

The conclusion seems unavoidable.

(a) That the rules requiring cab aprons to be of proper length and width to insure safety and the minimum width of the gangway between locomotive and tender, while standing on straight track to be 16 inches, are specific rules under the safety appliance and locomotive boiler inspection acts designed to protect a particular class of persons, namely locomotive engineers and firemen, against a particular class of injuries.

(b) The violation of this specific duty is negligence *per se* and

(c) That therefore a specific right of action exists on the part of the plaintiff against the defendant in the instant case for the specific acts of negligence mentioned in the complaint.

Furthermore the violation of the rules referred to above constitute penal offenses under Section 9 of the Locomotive Boiler Inspection Law. See *supra.*

It is plain under the words of section 9 that the defendant carrier is liable to the imposition of the penalty for each rule or regulation violated.

D

Such being the case, a civil liability in favor of the person injured exists as well as the penal liability.

E

When the protection imposed by the Statute for violation of which the penalty is imposed is for the benefit of a class or individual of a class an individual right of action accrues to the party injured.

I. C. J. (Article Actions) 957 and note 30;

Harrod vs. Latham Mercantile and Commercial Co., 77 Kan. 466, 99 Pac. 10;

Berdos vs. Tremont and Suffolk Mills, 209 Mass. 489, 95 N. E. 876;

The Union Pacific Railway Company vs. McDonald, 152 U. S. 262, 14 Supt. Ct. 619, 38 L. Ed. 434, 443.

San Antonio vs. A. P. R. Co. vs. Wagner 241 U. S. 476, 36 Sup. Ct. 626, 60 L. Ed. 1110. In this last-mentioned case, the Supreme Court distinctly says, Page (L. Ed.) 1117 THAT A DISREGARD OF THE COMMAND OF THE SAFETY APPLIANCE ACT "IS A WRONGFUL ACT, AND WHERE IT RESULTS IN DAMAGE to one of the class for whose special benefit the Statute was enacted, the right to recover the damages is implied." "If this act is violated, the question of negligence in the general sense of want of care is immaterial, 241 U. S. 43, and cases cited. But the two Statutes are *in pari materia,* and where the Employer's Liability Act refers to "any defect or insufficiency, DUE TO ITS NEGLIGENCE, in the cars, engines, ap-

pliances" etc., it is clearly the legislative intent to treat a violation of the Safety Appliance Act as 'negligence'—what is sometimes called negligence *per se.*"

The caps above were ours.

Mr. Justice Moody, St. Louis, I. M. & S. Ry Co. ve. Taylor, 210 U. S. 281, 52 L. Ed. 1061 emphasizes the point that the duty imposed by the safety appliance acts is SPECIFIC, and that the violation of each specific duty, when resulting in injury, is actionable On page 1067 he says "We need not enter into the wilderness of cases upon the common law duty of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery and appliances, or consider when and how far that duty may be performed * * * In the case before us, the liability of the defendant does not grow out of the common law of master and servant. The Congress, not satisfied with the Common Law duty, and its resulting liability, has prescribed and defined the duty by Statute * * * The obvious purpose of the legislature was to supplant the qualified duty of the Common Law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured thereby." Can anything be more plain?

F

IN ORDER THAT THE RULE OF *RES ADJUDICATA* OR THE RULE AGAINST SPLITTING OF ACTIONS SHALL APPLY, THE SECOND ACTION MUST REFER TO A LEGAL DUTY, THE VIOLATION OF WHICH WAS THE BASIS OF THE FIRST ACTION. THIS WAS NOT THE CASE HERE, FOR REASONS ABOVE GIVEN.

G.

BEFORE THE RULE OF *RES ADJUDICATA* OR THE RULE AGAINST SPLITTING OF ACTIONS CAN APPLY, THERE MUST BE IN THE TWO ACTIONS TO WHICH THE RULES ARE SOUGHT TO BE APPLIED IDENTITY (1) OF SUBJECT MATTER, (2) OF CAUSE OF ACTION, (3) OF PARTIES AND (4) OF QUALITY OF PERSONS.

Eteburn vs. Neary, 186 Pac. 457;

Privett vs. U. S. 261 Fed. 351;

Hoffmeier vs. Trost, 85 Atl. (N. J. 221.

H.

A proper test to apply in determining this question is to ascertain whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first.

Hoffmeier et al. vs. Trost (*supra*).
Sarson vs. Maccia 108 Atl. 109.

It is plain that applying this test judgment in the first Miller action is not a bar to the second, and that the rule against splitting actions is not violated in bringing the second suit.

I.

If full recovery of damages had been had on judgment for plaintiff following a verdict in his favor in the first suit, doubtless recovery could not have been had in the second suit, not because the legal duty violated was the same in each suit (for plainly it was not) but because the injuries were the same, and the plaintiff having been compensated once, he could not be compensated a second time.

Besides, the fact that two distinct acts of negligence result in the same injuries is no bar to an action based on one of them.

See remarks of District Judge Shiras in *Voelker vs. Chicago M. & St. P. Ry. Co.,* 116 Fed. 867 at 875.

J.

The objection that under the rule for which plaintiff contends, a defendant could be vexed with continual and numerous lawsuits, we respectfully submit, is not a valid objection in the instant case,

(1) Because the short period of the Statute of Limitations (2 yrs.) practically negatives the idea of continual vexation.

(2) Because the plain words of the Statutes are not to be disregarded (see Mr. Justice Moody's remarks on that point in *St. Louis M. & S. Ry. Co. vs. Taylor, supra,* 52 L. Ed., at page 1068), page 32 this brief and

(3) Because the essential purpose of the Acts is the protection of lives and limbs of employees and passengers and railroads are required strictly to comply with its provisions.

VI.

VIOLATION OF FOURTEENTH AMENDMENT TO CONSTITUTION OF THE UNITED STATES.

A.

Counsel for the plaintiff respectfully submits upon the above cited authority and reasoning:

That each violation of each rule of the Interstate Commerce Commission under the Locomotive Boiler Inspection Act is a specific violation of plaintiff's rights under the Federal Acts and Rules discussed in this brief.

2. That therefore, the violations of these rules alleged in the instant case being different violations of

different rules than those alleged in the first cause of action, it results necessarily that the cause of action in the instant case is distinctly different from the cause of action in the first case.

3. That therefore the plaintiff did not violate the rule against splitting actions in bringing the second case.

4. That therefore the second cause of action is a valuable property right, a chose in action, belonging to the plaintiff.

Williams vs. Atlantic Coast Line R. Co. 69 S. E. 402.

B.

The plaintiff then having this property right, conferred upon him by the Federal Acts and Rules discussed in this brief, and not yet having had "his day in court" for the purpose of enforcing it, the defendant now proposes that plaintiff shall not have any day in court in order to enforce this right (although action on the same was begun within the two year period of limitation) merely because the plaintiff failed to recover judgment against the defendant on an entirely different cause of action. No statute has taken away the plaintiff's right; the rule against splitting actions cannot apply; the action never has been brought before, and the matter never yet has been adjudicated.

Counsel for plaintiff respectfully submits that to deprive plaintiff of this right before adjudication is depriving plaintiff of his property without due process of law

As was said by Mr. Justice Mathews in *Pritchard vs. Norton* 106 U. S. 104, 27 L. Ed. 105 at page 107:

> "Hence it is that a vested right of action is property in the same sense in which tangible things are property and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law it is not competent for the Legislature to take it away."

If the Legislature cannot take it away, certainly no court can do so rightfully.

In *Williams vs. Atlantic Coast Line R. Co.,* 69 S. E. 402, at page 403 the Supreme Court of North Carolina, speaking through Mr. Justice Manning quotes with approval Wade on Retroactive Laws as follows:

> "Thus, where an act of negligence produced a personal injury, for which the person suffering the same was entitled by the existing law to recover the full amount proved, it was held that a subsequent statute limiting the recovery to a less sum would not affect the rights of the injured party. He had a vested right, not only

to compensation for his injuries, but to the measure of damages fixed by the law when the action accrued."

Again on page 403, the Court points out the distinction between rights of action otherwise existing and those created by Statute, as in the instant case, and says that when a right of action has been created by statute and action begun thereunder, that such right cannot be taken away even by repealing the statute, unless by express terms.

It must not be forgotten that the Federal Statutes and Rules of the Interstate Commerce Commission in effect say (1) that the defendant violated plaintiff's right when it made the gangway, upon which the plaintiff slipped, too narrow a space upon which to stand, (2) that it again violated plaintiff's right when it made its cab apron too short, thus leaving a wide and dangerous hole through which the plaintiff, after slipping fell to his great damage. (3) that by virtue of these distinct torts the plaintiff has his rights of action.

These rights of action never have been enforced.

How can any Court rightfully take away what Acts of Congress have given?

If there is anything wrong with these Statutes and Rules (which plaintiff denies) let them be changed by the properly constituted authorities, but not by the Courts.

Wherefore plaintiff respectfully prays that the error of the District Court in granting the motion of the defendant for judgment for defendant on the pleadings and dismissal of the action be corrected.

by his Attorney,

GEORGE D. AYERS,

Ziegler Building,

Spokane, Washington.

APPENDIX.

Certified copy of Judge Rudkin's opinion in the first action of Miller vs. Spokane International Railway Company denying motion for new trial. It is this action upon which the answer of *res adjudicata* in the instant case is based. The italics below are ours.

GEORGE E. MILLER,
Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY, a corporation,
Defendant.

No. 3545
MEMORANDUM

George D. Ayers, *Attorney for the Plaintiff.*

Allen, Winston & Allen, *Attorneys for the Defendant.*

Rudkin, District Judge. This was an action to recover damages for personal injuries. At the time of receiving the injuries complained of the plaintiff was a locomotive engineer in the employ of the defendant. The negligence charged in the camplaint was twofold. First, because the cab apron was not roughened or other provisions made to afford a secure footing as required by the regulations of the Interstate Com-

merce Commission, and second, because the apron extended upwards from the floor of the tender a distance of from one to one and one-half inches. These allegations of the complaint were controverted by answer and the trial resulted in a verdict and judgment for the defendant. The plaintiff has interposed a motion for a new trial based upon what is styled newly discovered evidence or facts. The motion is not based upon error committed during the trial nor upon the discovery of any new testimony material to the issues made by the original pleadings. *On the contrary the plaintiff is seeking a new trial for the purpose of presenting to a new jury a new and independent charge of negligence not contained or even referred to in the original complaint.* To this extent the situation is a novel one, to say the least. The new charge of negligence is in substance that the cab apron was not of proper length and width to insure safety as required by the regulations of the Interstate Commerce Commission. It is admitted that this fact, if it is a fact, was fully known to the plaintiff at and prior to the time of the former trial. Indeed, the chief issue upon that trial was whether a certain cab apron exhibited to the jury was the cab apron in use at the time of the injury. If it was, no issue was made as to its safety or sufficiency, and the jury found that issue against the plaintiff. Some point seems to be made, inferentially at least, of the fact that the cab apron in use at the time of the injury had passed inspection by the inspectors of the Interstate Commerce Commission prior to the injury but since that time the inspectors, or other and different inspectors, have changed their views

and condemned the apron as unsafe and insufficient. And in this connection my attention is directed to a decision of the Supreme Court of this state holding that a party who failed to offer testimony at the trial which was inadmissible under the then rulings of the Supreme Court was entitled to a new trial on the ground of surprise after the Supreme Court had overruled its former decisions and held the testimony admissible. If the inspection or the result of the inspection by the inspectors of the Interstate Commerce Commission stood upon the same footing as a decision of the Supreme Court of the state the plaintiff might or might not be entitled to a new trial here. But the inspection or lack of inspection had nothing whatever to do with the former trial. The decision or conclusion of the inspectors as to the safety or sufficiency of the cab apron was not competent evidence at the trial for or against either party. In fact the case was prosecuted in defiance of, rather than in reliance upon, the result of any inspection theretofore made. If a new trial is to be granted in a case like this, with a change of attorneys and a change of issues, litigation will never end, and this is especially true where the additional facts were known to the complaining party at the time of the former trial.

The motion for a new trial is therefore denied.

UNITED STATES OF AMERICA
EASTERN DISTRICT OF WASHIKGTON } SS

I, Alan G. Paine, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that I have compared the foregoing copy with the original MEMORANDUM in Cause No. 3545 George E. Miller vs. Spokane International Railway Company, a corporation, in the foregoing entitled cause, now on file and of record in my office at Spokane, and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said Court this 29th day of Augst, 1923.

ALAN G. PAINE, Clerk.